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Docket No. 02-0402.
October term 2002

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OKLAHOMA, DEPARTMENT OF CORRECTIONS,
a state governmental entity, petitioner,
v.
CHARLES K. STEWART,
an individual, respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CHARLES K. STEWART.

CO-COUNSELS FOR RESPONDENT
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QUESTIONS PRESENTED FOR REVIEW.

In this case, 2 questions are presented for review:

(i) is review of 29 CFR §1601.28(d), the regulation in question, a reasonable regulation under *Chevron* and entitled to judicial deference for which the 11th Amendment is irrelevant; and

(ii) has respondent CHARLES STEWART exhausted his Title VII administrative remedies.

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SUPPLEMENT TO PETITIONER'S LIST OF PARTIES.

In this case, Case No. 00-CV-344-K below, the U. S. District Court below has stayed proceedings on respondent, CHARLES STEWART's 42 USC §1981 race discrimination claim against co-defendant below, James L. Saffle, in his personal capacity as the former director of the Oklahoma Department of Corrections pending the outcome of this appeal.

CORPORATE DISCLOSURE STATEMENT.

Respondent, CHARLES STEWART, is not aware of any other appeals involving any of the parties or on the subject matter of this case. Except as to James L. Saffle as stated above, respondent, CHARLES STEWART, does not have any other related appeals or other related litigation in the federal courts, nor has he had any other related appeals in the federal courts.

Docket No. 02-0402.

October term 2002

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OKLAHOMA, DEPARTMENT OF CORRECTIONS,
a state governmental entity, petitioner,
v.
CHARLES K. STEWART,
an individual, respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT.

RESPONDENT, **CHARLES STEWART** (hereinafter "RESPONDENT" or "CHARLES STEWART"), hereby states his reasons why the petition for a writ of certiorari of PETITIONER, **STATE OF OKLAHOMA** with respect to its state agency, **DEPARTMENT OF CORRECTIONS** (hereinafter "OKLAHOMA", "DOC" or "PETITIONER"), should be denied and the case remanded to the District Court for trial.

I. COUNTER STATEMENT OF THE CASE.

Respondent agrees with facts 1 through 10 in petitioner's statement of the case. Pet. for certiorari at p. 1-2.

Concerning fact 11 in petitioner's statement of the case, the actual content of the letter from the Civil Rights Division of the U.S. Department of Justice (other than in the following quote hereinafter "USAG") is a more accurate statement of the USAG's 10-11-00 reasons for denial of a notice of right to sue for respondent. Pet. for certiorari at p. 2-3. This 10-11-00 letter states:

> Your letter dated September 13, 2000, addressed to Ms. Karen Ferguson, Civil Rights Analyst for the Department of Justice, Employment Litigation Section, Right to Sue Unit, was forwarded to my attention for consideration and response. In your letter you request that the Department of Justice issue a notice of right-to-sue to your client, Charles Stewart, on this matter since the defendant in the above suit is a state agency.
>
> A document enclosed with your correspondence indicates that the Equal Employment Opportunity Commission (EEOC) issued a notice of right-to-sue to

your client on this matter on February 2, 2000 when it dismissed the charge, Charge No. 311980947, on the cited ground that, based upon its investigation, the EEOC was unable to conclude that the information obtained established a violation of the statute. This notice of right-to-sue was issued in accordance with the procedural regulations of the EEOC. See 29 C.F.R. Section 1601.28(d). In all instances where there is a dismissal of a charge against a government, governmental agency or political subdivision, the EEOC rather than the Attorney General (Department of Justice) issues the notice of right-to-sue.

We are, therefore, unable to send you a separate notice of right to sue on this charge.

Sincerely,
Bill Lann Lee
Assistant Attorney General
Civil Rights Division.

See Exhibit No. 106, U.S. DOJ 10-11-00 letter to respondent's counsel, p. 116-17, in Oklahoma's 9-14-01 Appellant Appendix filed with the 10th Circuit below.

Concerning fact 12 in petitioner's statement of the case, i.e., "Plaintiff elected to stand on his EEOC "Right to Sue" letter", a more

accurate statement of that fact is "Respondent went as far as he could in exhausting his Title VII administrative remedies and in his unsuccessful attempt to get the USAG to issue a notice of right to sue on his charge of discrimination". See Respondent's 6-20-01 brief in response to DOC's 5-10-01 summary judgment motion at PROPOSITION II, p. 19-21, p. 97-99, in Oklahoma's 9-14-01 Appellant Appendix filed with the 10th Circuit below.

II. REASONS FOR DENYING THE WRIT.

PROPOSITION I: Because Oklahoma has not challenged the application of Title VII itself to state agencies, Oklahoma has incorrectly posed its petition for certiorari. [De novo standard of review on summary judgments and on questions of law].

At p. 5 of its petition for certiorari, Oklahoma stipulated that it waived any 11th Amendment challenge to Title VII itself and did not challenge this Court's 1976 decision in *Fitzpatrick v. Bitzer*. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976). Thus Oklahoma has waived any challenge to Title VII and rather focuses its challenge to that portion of 29 CFR §1601.28, the EOC regulation which provides for EEOC issuance of right to sue notices against state agencies. Pet. for certiorari at p. 4-5.

This waiver of challenge to Title VII itself means that Oklahoma must restrict its challenge to a *Chevron* type challenge to the validity of subsection (d) of regulation 29 CFR §1601.28. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984). Alleged immunity under the 11th Amendment is irrelevant to Oklahoma's petition for certiorari if the EEOC regulation in question, 29 CFR §1601.28(d), was a valid exercise of the EEOC's statutory authority to issue procedural regulations under 42 USC §2000e-12(a). 42 USC §2000e-12(a) states the EEOC has authority to issue "procedural

regulations" to carry out the provisions of Title VII.

In summary, because Oklahoma has waived any 11th Amendment challenge to Title VII itself, Oklahoma is struck with accepting as valid the statutory language and purposes of Title VII as well as any validly issued procedural regulations under Title VII issued pursuant to 42 USC §2000e-12(a).

PROPOSITION II: The EEOC procedural regulation in question, 29 CFR §1601.28(d), is a valid exercise of the EEOC's statutory discretion under 42 USC §2000e-12(a) because it is a reasonable attempt to carry out the purpose of Title VII. [De novo standard of review on summary judgments and on questions of law].

Chevron established two criteria that a court should use to determine the validity of an administrative regulation issued pursuant to express statutory authority for such regulations. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). These two criteria are:

1. If the Congressional intent is clear from the statute, the administrative agency "must give effect to the unambiguously expressed intent of Congress" in its regulations.

2. If the Congressional intent is not clear from the statute or "Congress has not directly addressed the precise question at issue", the reviewing court must defer to any reasonable interpretation in the administrative agency's regulations.

The "precise question at issue" for this petition for certiorari is whether Title VII vest exclusive authority for the issuance of right to sue notices against state agencies in the USAG's hands? A careful reading of 42 USC §2000e-5(f)(1) discloses no such exclusive statutory authority vested in the USAG. The excerpt from 42 USC §2000e-5(f)(1) that Oklahoma quoted at p. 5 of its petition for certiorari merely states that the USAG "shall so notify the person aggrieved" of his or her right to sue the state agency within 90 days of the date of such notice". Nothing in Title VII and 42 USC §2000e-5(f)(1) in particular prohibits the EEOC from issuing right to sue notices against state agencies. Therefore Title VII and 42 USC §2000e-5(f)(1) in particular are silent on the EEOC's authority to issue right to sue notices against state agencies.

Because Congressional intent is not clear and "Congress has not directly addressed the precise question at issue", i.e., the EEOC's authority to issue right to sue notices against state agencies, we must proceed to criteria No. 2. See *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) ("Rather, if the

statute is silent or ambiguous with respect to the specific issue, the question of the court is whether the agency's answer is based on a permissible construction of the statute"). That is whether the EEOC procedural regulation in question, 29 CFR §1601.28(d), is within the zone of reasonableness. *Chevron USA v. Echazabal,* Docket No. 00-1406, ____. U.S. ___. (6-10-2002). An EEOC regulation which chooses a policy among a range of possible policies is entitled to deference under *Chevron* when the chosen policy is in the "reasonable zone". *Chevron USA v. Echazabal,* Docket No. 00-1406, ____. U.S. ___. (6-10-2002) (EEOC's direct threat regulation under the ADA); Accord, *EEOC v. Commercial Office Products,* 486 U.S. 107, 115 (1988).

In this case, 29 CFR §1601.28(d) is within the reasonable zone for several reasons. First, there is nothing in the way public information which alerts aggrieved state employees that they are required to seek out the USAG to obtain a Title VII right to sue notice. Neither the USAG nor the EEOC alert aggrieved state employees to this alleged fact. Second, the EEOC has the "primary enforcement responsibility" for Title VII and 29 CFR §1601.28(d) was issued pursuant to the EEOC's statutory authority to promulgate procedural regulations under Title VII. *EEOC v. Commercial Office Products,* 486 U.S. 107, 115 (1988). Third, there is nothing in Title VII which prevented the EEOC and the USAG pooling their resources in fighting workplace discrimination and retaliation illegal under Title

VII. Fourth, there is every reason for both the EEOC and the USAG, "to avoid unnecessary duplication of effort or waste of time" through the division of labor in 29 CFR §1601.28(d). *EEOC v. Commercial Office Products*, 486 U.S. 107, 122 (1988).

Finally outside the *Chevron* analysis, the EEOC adopted 29 CFR §1601.28(d) on March 12, 1974. Petition for cert. Appendix p. 21 n. 1. March 12, 1974 was 2 years before this Court's decision in *Fitzpatrick v. Bitzer* which rejected an 11th Amendment challenge to all of Title VII and was 17 years before Congress substantially amended Title VII in 1991 without any change to 29 CFR §1601.28(d), 42 USC §2000e-12(a), or 42 USC §2000e-5(f)(1). *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976); P.L. 102-166, Civil Rights Act of 1991. As stated by this Court in *North Haven Bd. Of Ed. V. Bell*, "[w]here an agency's statutory construction has been fully brought to the attention of the public and the Congress and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned". *North Haven Bd. Of Ed. V. Bell*, 456 U.S. 512, 535, 102 S.Ct. 1912 (1982); Accord, *Walker v. UPS*, 240 F.3d 1268, 1274 & 1278 (10th Cir. 2001) (cited both *North Haven* and *Chevron* as two of the reasons for upholding 29 CFR §1601.28(a)(2), the EEOC's early right to sue regulation).

In summary, the EEOC issuance of right

to sue notices under 29 CFR §1601.28(d) is within the zone of reasonableness when Title VII is silent on the issue and there are several compelling reasons for the EEOC/USAG division of labor in 29 CFR §1601.28(d). When government agency's regulation is in such a reasonable zone, it is entitled to deference by a reviewing court. Finally 29 CFR §1601.28(d) was part of Title VII when this Court rejected the 11th Amendment challenge in its 1976 *Fitzpatrick v. Bitzer* decision and when Title VII was amended in 1991 without change to 29 CFR §1601.28(d)..

PROPOSITION III: Even if we assume arguendo that Oklahoma is correct in its assertion that only the USAG can issue right to sue notices against state agencies, CHARLES STEWART exhausted his Title VII administrative remedies when the USAG refused to issue a notice of right to sue on 10-11-00. [De novo standard of review on summary judgments and on questions of law].

At Propositions I and II above, respondent explained why this is not a 11th Amendment case but rather a *Chevron* case on the validity of EEOC procedural regulation in question, 29 CFR §1601.28(d). Now let's assume that Oklahoma is correct, i.e., only the USAG can issue right to sue notices against state agencies. Oklahoma's petition for certiorari should still be denied. The

outcome is still the same as that affirmed by the 10th Circuit below. This is because CHARLES STEWART exhausted his Title VII administrative remedies when the U.S. Department of Justice refused to issue a notice of right to sue on 10-11-00.

Title VII's administration exhaustion requirement does not change just because the respondent employer is a state agency and the complainant is a state employee. Title VII was amended in 1972 to extend coverage to state employees pursuant to Congressional authority under §5 of the 14th Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n. 9, 96 S.Ct. 2666, 2670 n. 9 (1976). In the Equal Employment Opportunity Act of 1972, Congress did not change any of charge processing procedures already established to exhaust private employee complaints of discrimination and/or retaliation. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 n. 2, 96 S.Ct. 2666, 2668 n. 2 (1976); See also *Delaware St. College v. Ricks*, 449 U.S. 250 (1980) (EEOC processed state employee charge and issued his right to sue notice). Substantively the Equal Employment Opportunity Act of 1972 merely expanded the pre-existing Title VII definitions of employer, person, and employee. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 n. 2 , 96 S.Ct. 2666, 2668 n. 2 (1976).

The basic reason for Title VII's administration exhaustion requirement is so the appropriate equal employment agency of the

state and/or federal government can investigate a charge of Title VII discrimination and/or retaliation and when appropriate, initiate a conciliation effort to resolve the charge before a lawsuit is filed. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359-360 & 368 (1977); Accord, *Walker v. UPS*, 240 F.3d 1268, 1275 (10th Cir. 2001); *Martini v. Federal Nat. Mortg. Assn*, 178 F.3d 1336 (DC Cir. 1999).

Under Title VII, administrative exhaustion can occur even in the absence of a piece of paper stating a right to sue. In fact, administrative exhaustion can occur any number of ways other than with the issuance of a right to sue notice or literal compliance with 42 USC §2000e-5(f):

- Under the "single filing" rule, the Circuit Courts recognize that a Title VII plaintiff does not even have to have filed a charge of discrimination with the EEOC, the USAG, or a state fair employment agency let alone get a right to sue notice in order to exhaust his or her administrative remedies:

> Federal courts "'universally hold that an individual who has not filed an administrative charge can opt-in to a suit filed by any similarly situated plaintiff under certain conditions.'" *Mooney*, 54 F.3d at 1223 (quoting *Anson v. Univ. of Tex. Health Sci. Ctr.*, 962 F.2d 539, 540 (5th Cir. 1992)); see *Mistretta v. Sandia Corp.*, 639 F.2d

588, 594-95 (10th Cir. 1980) (adopting ≤single≥-≤filing≥ ≤rule≥ in ADEA action). "This so-called `≤single≥-≤filing≥ ≤rule≥' generally allows a plaintiff, who did not file an ≤EEOC≥ charge, to piggyback on the ≤EEOC≥ complaint filed by another person who is similarly situated." *Mooney*, 54 F.3d at 1223; see *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 558 (11th Cir. 1997) ("A plaintiff who has not filed an individual ≤EEOC≥ charge may invoke the ≤single≥-≤filing≥ ≤rule≥ where such plaintiff is similarly situated to the person who actually filed an ≤EEOC≥ charge, and where the ≤EEOC≥ charge actually filed gave the employer notice of the collective or class-wide nature of the charge."). "The policy behind the ≤single≥ ≤filing≥ ≤rule≥ is that '[i]t would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the ≤EEOC≥.'" *Mooney*, 54 F.3d at 1223 (quoting *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968)). "As long as the ≤EEOC≥ and the company are aware of the nature and scope of the allegations, the purposes behind the filing requirement are satisfied and no

injustice or contravention of congressional intent occurs by allowing piggybacking." Id. at 1223. *Thiessen v. GE Capital*, 267 F.3d 1095 (10th Cir. 2001).

- Second, "[w]hen an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint, nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge ...". *Ingels v. Thiokol Corp.*, 42 F.3d 616, 625 (10th Cir. 1990). A plaintiff is excused from filing an actual charge for Title VII violations which are similar to or reasonably related to the allegations stated in another charge of discrimination and/or retaliation filed by that plaintiff. Thus for like or reasonably related discrimination, administrative exhaustion occurs in the absence of a literal charge to the USAG or the EEOC or a notice of right to sue from the USAG or the EEOC.

- Third, a Title VII plaintiff does not have to file an actual charge of discrimination and receive a notice of right to sue from the USAG or the EEOC on discrimination or retaliation which occurs due to the filing of an earlier charge of discrimination. *Aramburu v. The Boeing Co.*, 112 F3d 1398, 1409 (10th Circuit 1997). Thus for subsequent discrimination or retaliation, administrative

exhaustion occurs in the absence of a literal charge to the USAG or the EEOC or a notice of right to sue from the USAG or the EEOC.

- Fourth, a Title VII plaintiff does not have to file an actual charge of discrimination and receive a notice of right to sue from the EEOC on discrimination or retaliation which is discovered or should have been discovered during an EEOC investigation of a properly filed charge of discrimination. *Woelbling v. R.C. Wilson Co.*, 966 F.Supp. 858, (E.D. Mo. 1997) ("... the sweep of the subsequent judicial complaint may be as broad as the scope of the [agency]'s investigation which could reasonably be expected to grow out of the charge of discrimination"). Thus for discrimination or retaliation discovered or discoverable during an EEOC or USAG investigation, administrative exhaustion occurs in the absence of a literal charge to the USAG or the EEOC or a notice of right to sue from the USAG or the EEOC.

- Fifth, even though the purpose of the Title VII administrative exhaustion requirement is to allow the USAG or the EEOC investigate and if appropriate, to attempt to conciliate the charge of discrimination, the Title VII administrative exhaustion requirement does not prevent the USAG or the EEOC from streamlining its

administrative process and issuing a notice of right to sue prior to the completion of the period for investigation/conciliation process. *Walker v. UPS*, 240 F.3d 1268 (10th Cir. 2001).

All five of the preceding examples show that regardless of whether only the USAG is allowed to issue right to sue notices to aggrieved state employees, literal compliance with 42 USC §2000e-5(f) is not required to exhaust Title VII's administrative remedies.

The U. S. Supreme Court has addressed administrative exhaustion on a number of occasions. While stating that administrative exhaustion is "intensely practical" in application, the U. S. Supreme Court has consistently held that exhaustion of administrative remedies is not required when: (i) it is futile; (ii) it requires an indefinite wait for an administrative decision; and (iii) it forces a plaintiff in effect to suffer some sort of irreparable harm or undue prejudice. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (administrative exhaustion not required when "futile" citing *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n. 21 (1985); *Smith v. Ill. Bell Tele. Co.*, 270 U.S. 587 (1926) (administrative exhaustion not required when it requires an indefinite delay); *Walker v. Southern R. Co.*, 385 U.S. 196, 198 (1966) (administrative exhaustion not required when it requires a 10 year delay); *McCarty v. Madigan*, 503 U.S. 140 (1992) (administrative exhaustion not required

when it results in irreparable injury or undue prejudice).

Oklahoma argued that CHARLES STEWART cannot sue on his Title VII claims until the USAG issues a right to sue notice to him, yet on 10-11-00 the U.S. Department of Justice informed CHARLES STEWART that it would not issue a right to sue notice to him. When this "Catch 22" makes exhaustion "futile", requires an "indefinite delay" or "irreparable injury" or "undue prejudice", exhaustion of administrative remedies is not required. Similar to the 10th Circuit reasoning in its recent EEOC administrative exhaustion decision, CHARLES STEWART "should not denied h[is] day in court because of [USAG]'s negligence". *Walker v. UPS*, 240 F.3d 1268, 1273 (10th Cir. 2001). Private parties do not have the authority under Title VII to compel the federal government to issue right to sue notices. See *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir. 1999). Like the Title VII plaintiff in *Walker v. UPS*, CHARLES STEWART "took every step required to exhaust h[is] administrative remedies'. *Walker v. UPS*, 240 F.3d 1268, 1272-73 (10th Cir. 2001).

In summary, CHARLES STEWART exhausted his Title VII administrative remedies when the USAG refused to issue a right to sue notice on 10-11-00. CHARLES STEWART cannot compel a federal government department to issue a Title VII right to sue notice. Requiring a right to sue notice issued by the USAG is in

effect permanently denying CHARLES STEWART his day in court on his Title VII claims. The courts do not require literal compliance with 42 USC §2000e-5(f) nor does the U. S. Supreme Court require resort to a futile, prejudicial "Catch 22" administrative procedure.

PROPOSITION IV: Oklahoma's petition for certiorari should also be denied because this is a *Chevron* reasonable regulation to which 11th Amendment immunity and the collateral order doctrine are irrelevant. [De novo standard of review on summary judgments and on questions of law].

Oklahoma based its right to appeal the summary judgment denial by the U.S. District Court below on the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Oklahoma argued below that because it was not granted 11th Amendment immunity from suit under Title VII that denial of immunity was immediately appealable. FRAP Rules 3 & 4 & FRCP Rule 54.

However assuming this Court accepts the respondent's position in Propositions I and II above that this is a *Chevron* type reasonable regulation case and not in fact an 11th Amendment case, then Oklahoma's basis for an appealable collateral order ceases to exist. Therefore if this Court accepts respondent's

position in Propositions I and II above, Oklahoma's petition for certiorari should be denied for that ground alone and the case remanded to the courts below for further proceedings.

III. CONCLUSION.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be denied for the reasons stated at Proposition I through Proposition IV above and that this case be remanded to the courts below for further proceedings. See Proposition I through Proposition IV above.

Respectfully submitted,

[Original signed by Thomas L. Bright]
CO-COUNSELS FOR RESPONDENT
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APPENDIX TO RESPONDENT'S OPPOSITION BRIEF

42 USC §2000e-12(a):

> (a) The Commission shall have the authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of title 5.